SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

No. 359

JOHN F. GRAHAM,

Petitioner,

v.

THE HON. HAROLD H. GREENE
THE HON. CATHERINE B. KELLY
THE HON. TIMOTHY MURPHY
DALE C. CAMERON, M.D.
and
THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Pro se

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To the Honorable, The Chief Justice, and The Associate Justices of The Supreme Court of the United States.

The petitioner, *pro se*, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which upheld the decree in favor of respondents and dismissed petitioner's actions for malicious prosecution, false imprisonment, negligent treatment, cruel and unusual punishment, and deprivation of civil rights and, in support of his petition, does show:

1. The opinion of the United States Court of Appeals for the District of Columbia Circuit is not reported as of this date and the judgment is appended hereto on page 9, *infra*.

2. The judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the judgment of the United States District Court for the District of Columbia and remanding for entry of a judgment of dismissal is dated May 2, 1968.

JURISDICTION

The jurisdiction of this Honorable Court to review by way of certiorari is based on United States Code, Title 28, Sections 1254(1) and 2101(c), and Supreme Court Rules, Rule 19, Subsection 1(b).

QUESTIONS PRESENTED

1. Is a committing magistrate empowered to act as a court in ordering accused committed to a hospital for mental examination?

2. Is a State or municipal court empowered to determine whether accused is competent to stand trial in a Federal court?

3. Is a judge of an inferior court empowered to imprison, without admitting to bail, a person accused of an offense against the laws of the United States prior to grand jury indictment?

4. Where a Government psychiatrist testifies that accused is capable of understanding the nature of the charges which may be lodged against the accused and offers no evidence that the accused is dangerous to himself and others, is a State (or municipal) court empowered to commit the accused to a mental hospital for treatment?

5. Is a judge of an inferipr court acting outside of his jurisdiction immune from liability to the injured party?

6. Is a prosecuting attorney acting outside of his jurisdiction protected by color of law?

7. Is the superintendent of a mental hospital immune from liability to a party falsely imprisoned?

8. Is the United States immune from liability for personal injury caused by the negligent or wrongful act of a Government employee?

9. Does a complaint alleging malicious prosecution, false imprisonment, negligent treatment, cruel and unusual punishment and/or deprivation of civil rights state a claim upon which relief can be granted?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution:

Article III, Section 2
Article IV, Section 2
Fifth Amendment
Sixth Amendment
Eighth Amendment
Fourteenth Amendment, Section 1

United States Code:

18 U.S.C. 876
18 U.S.C. 3041
18 U.S.C. 3231
18 U.S.C. 4244
28 U.S.C. 1346(b)
28 U.S.C. 2674
42 U.S.C. 1983

District of Columbia Code:

11 D. C. Code 521(a)
23 D. C. Code 103
24 D. C. Code 301

United States Statutes at Large:

2 Stat. 107, §11
12 Stat. 580, §6
31 Stat. 1190, §3
35 Stat. 623, c. 134
56 Stat. 190, c. 207
76 Stat. 1171

STATEMENT OF THE CASE

In an act which petitioner considered one of civil disobedience but which, because it was a lone gesture with less than cosmic significance, a more reasonable man would consider the act of a nut, petitioner mailed a threatening letter to a person he believed had taken away his daughter for the purpose of marriage, such taking away being a felony under common law. 3 E. 1.13; 3 H. 7.2. Petitioner sent a copy of the said threatening letter to a special agent of the FBI, and voluntarily submitted to arrest on November 30, 1965. The question here, however, is not the rationality of petitioner but whether a committing magistrate is empowered to detain, for whatever reason, any person accused of a felony, rather than to admit him to bail and bind him over to the trial court.

Pursuant to Rule 5(a), Federal Rules of Criminal Procedure, petitioner was taken before a judge of the District of Columbia Court of General Sessions, which judge, pursuant to 18 U.S.C. 3231 and 11 D. C. Code 963(c), was sitting as a committing magistrate. Instead of discharging the petitioner or admitting him to bail and binding him over to the trial court (U. S. District Court), the said committing magistrate ordered petitioner committed to D. C. General Hospital for a 30-day mental examination. At the expiration of the thirty days, petitioner was taken before a judge of the District of Columbia Court of General Sessions. Although petitioner resisted the Assistant United

States Attorney's attempts to foist a judicial declaration of insanity on him; although petitioner's wife, to whom petitioner had been married for 19 years, testified as to petitioner's sanity, and although a Government psychiatrist categorically stated under oath that petitioner understood the charges against him, the aforesaid judge of the District of Columbia Court of General Sessions ordered petitioner committed to St. Elizabeths Hospital as a person "of unsound mind and mentally incompetent to stand trial and unable to consult with counsel to properly assist in his own defense."

Petitioner was admitted on January 4, 1966, to St. Elizabeths Hospital where, on that date, the examining psychiatrist found petitioner to be "excellently oriented" with "no impairment of his intellectual functioning." Shortly after admittance to St. Elizabeths Hospital petitioner became seriously ill, which illness may have been caused by pneumonia or by the administration of a potent drug which is known to have 26 possible side-effects.

Petitioner was indicted by a grand jury on February 24, 1966; on or about March 15, 1966, petitioner was declared by St. Elizabeths Hospital physicians to be competent to stand trial; and on March 31, 1966, an order was entered by the court for petitioner's immediate arraignment. Because it was claimed by the United States Attorney that a St. Elizabeths psychiatrist had declared petitioner to be suffering from a mental disease and to be "extremely dangerous", petitioner requested a judicial declaration of his competency. On May 23, 1966, a St. Elizabeths Hospital physician testified that petitioner was not considered dangerous, and petitioner was forthwith arraigned; entered a plea of not guilty to the indictment, and was released on his own recognizance. On October 19, 1966, the indictment was dismissed on motion of the Government.

On May 22, 1967, petitioner filed actions against the respondents in the United States District Court for the District of Columbia, which actions were dismissed on September 22, 1967, on the grounds that (1) the respondents were immune, and (2) petitioner had failed to state a claim upon which relief could be granted. In its judgment against petitioner the United States Court of Appeals for the District of Columbia Circuit evidently has decided Federal questions in a way in conflict with applicable decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower court as to call for an exercise of this Court's supervision. Jurisdiction was conferred on the United States District Court for the District of Columbia by 18 U.S.C. 1331(a).

ARGUMENT FOR GRANTING THE WRIT

Decisions of Federal Questions In Conflict With Applicable Decisions of This Court

Psychiatry, Morality and The Law

Irrepressible faith in necromancy, it seems, dwells eternal in the human heart. In Sir Matthew Hale's day educated men sought spiritual and material salvation in astrology and alchemy; today educated men seek absolution in psychiatry. To psychiatry's adherents the fact that the records of modern mental hospitals show a discharge rate lower than that of similar hospitals in the 18th century is without significance; society must have its panaceas and psychiatry fills all the necessary requirements.

This is not to disparage psychiatry; certainly no branch of medicine is of more importance than that devoted to the human mind, and unquestionably the world is deeply indebted to the great psychiatric specialists of the past; e.g., Tyson, Willis, Crichton, Woodward, Mitchell and Spitzka. But when psychiatry is, by its enthusiasts, represented as a substitute for law and morality, it is only a matter of time before psychiatry itself will fall victim to public disillusionment. And, tragically, this disillusionment will be precipitated in considerable measure by those psychiatric diagnosticians who, in criminal cases, pretend scientific omniscience but who, as it was once unkindly observed by the eminent Adolf Meyer, are in reality "racketeers."[1]

In any organized society the prestige of government is predicated on the power of punishment, and political philosophy has devised no better agent of punishment than the courts. In recent years, however, the courts have shown an increasing tendency in criminal cases to surrender their primary responsibility, the disciplining of society, to psychiatry, bestowing upon the psychiatrists the functions of judge, jury and jailer. This tendency is no more evident than in the District of Columbia, and any visitor to the District's weekly habeas corpus hearings can observe judges returning those "acquitted" by reason of insanity to continuing incarceration in St. Elizabeths, with no more evidence of the habeas corpus petitioner's insanity than a psychiatric trainee's say-so that the petitioner suffers from "anti-social reaction."

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[1]Cf. Sol Rubin, *Psychiatry and Criminal Law – Illusions, Fictions and Myths,* 1965; Alan M. Dershowitz, "Psychiatry in the Legal Process: A knife that cuts both ways," 4 Trial 29; Percival Bailey, M.D., "The Great Psychiatric Revolution," 113 Am. J. Psychiat. 387.

In an article titled "The Insanity Plea and the Insanity Verdict" (40 Temp. L. Q. 271) Thomas S. Szasz, M.D., professor of psychiatry at the Upstate Medical Center, Schenectady, N. Y., states:

> [O]ur age seems passionately devoted to *not* confronting problems of good and evil, and prefers, therefore, the rhetoric of medicine to the rhetoric of morals. It is as if modern judges had acquired the disability their predecessors had attributed to M'Naghten. M'Naghten, we are told, could not distinguish between right and wrong. Many judges, we may infer from their words and acts, prefer not to distinguish between right and wrong. They speak of mental illness and mental health rather than of good and evil, and mete out the penalty of commitment rather than of imprisonment.[2]

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[2]Cf. Thurman Arnold, *The Symbols of Government*, 1948, p. 130:

> For most persons, the criminal trial overshadows all other ceremonies as a dramatization of the values of our spiritual government, representing the dignity of the State as an enforcer of law, and at the same time the dignity of the individual when he is an avowed opponent of the State, a dissenter, a radical, or even a criminal. So important is the criminal trial to the whole ideological structure of government that its disappearance in favor of an efficient and speedy way of accomplishing the incarceration of persons supposed to be dangerous to the social order is always a sign of psychological instability of a people. . . . Society thinks it knows exactly what it wants to do, and hence has little patience with a process which gives dissenters from the social order a chance to air their opinions, or justify their antisocial acts.

(Continued)

The essential immorality of such procedure is patent, for, by meting out ~~the~~ penalty of commitment rather than of imprisonment the courts are surrendering to the psychiatrists the absolute power of punishment. From the moment of commitment the duration of the malefactor's imprisonment is solely within the discretion of the psychiatrists; there is no appeal from their verdict, and, by the simple declaration that the malefactor is "sick", the psychiatrists can keep him imprisoned for the rest of his life. This is accomplished under color of law (cf. 24 D. C. Code 301) and even where, as in this petitioner's case, the petitioner was arrested for an offense against the United States, local law is stretched to encompass those over whose person the courts have jurisdiction, no matter what the nature of the offense.

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[2](Continued)

See also Philip Q. Roche, M.D., *The Criminal Mind*, 1958, p. 79:

> Every criminal trial conveys a moral lesson. . . . [T]his function of the criminal trial is vital to the maintenance of a moral order; the actual events of a particular crime are important only to the extent that they set again in motion a process of realignment of social values. The parties to the actual crime pass into obscurity; the moral remains.

It is petitioner's observation that, while there may be social value in taking the criminally inclined out of circulation by commitment to a mental institution for an indeterminate period, by such commitment the crime is made to fit the punishment. To a judge oriented by former Department of Justice employment to the prosecution point of view this may be an appropriate method of disposing of criminals; unhappily it does not conform to the Constitution. In any event, as in petitioner's case, detention for six months between arrest and arraignment seems a bit much.

Coram Non Judice

Tempted as he may be to challenge the constitutionality of 24 D. C. Code 301, the statute upon which the Government relies to justify petitioner's commitment to D. C. General Hospital and St. Elizabeths, petitioner does not question the validity of the statute, but questions rather whether a local law can be invoked to imprison a person arrested for an offense against the United States. If this be permissible under the Constitution then it is equally permissible to deprive citizens of the District of Columbia of all privileges and immunities constitutionally guaranteed to citizens of every State.[3]

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[3]In a hearing on H.R. 6585 (S. 2274), the bill which later became 24 D. C. Code 301, Dr. John D. Schultz, then chief psychiatrist of the D. C. General Hospital, on June 8, 1955, told the Subcommittee on Crime Investigation of the House Committee on the District of Columbia:

> I have had several cases like that, and I could cite them by name now, where the family said, "all right, the only way we can get this man into the hospital is to bring a charge against him" and they bring a charge of disorderly conduct or some disturbance, or fracas in the household, and they bring a charge against him. I have had persons tell me this was the only way they could get the patient into the hospital . . . One of the problems is how to get these people into the hospital. It is for that reason that those charges are presented, and we get into a situation of having to use a criminal procedure in order to get a sick person into the hospital. However, we do have ways of handling that. The usual procedure is to have the charges dropped after the person has been at the hospital, and then commit the man through a civil proceeding.

(Continued)

That the District of Columbia, as a political entity, is a State there can be little question. For more than 160 years this Court has so held it. *Hepburn v. Ellzey*, 2 Cr. (6 U.S.) 443, 452; *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1, 9; *Geofroy v. Riggs*, 133 U.S. 258, 268-269; *Talbott v. Silver Bow County*, 139 U.S. 438, 444-445. If the District of Columbia is a State, then a District of Columbia court cannot take cognizance of an offense against the United States (Constitution, Article III, Section 2) for which the prisoner has not been indicted (Fifth Amendment), nor can the consent of the parties give jurisdiction to such a court. (*Capron v. Van Noorden*, 2 Cr. (6 U.S.) 125, 126).

It is an established rule that all proceedings in a court without jurisdiction of the offense are *coram non judice* and the law does not protect an officer who executes a void process. *Elliott v. Peirsol* 1 Pet. (26 U.S.) 328, 340; *Dynes v. Hoover*, 20 How. (61 U.S.) 68, 80; *Wise v. Withers*, 3 Cr. (7 U.S.) 330, 337. It is also an established rule that a judicial officer is liable to a civil action where he exercises a usurped authority. *Randall v. Brigham*, 7 Wall. (74 U.S.) 523, 535-536; *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 352; *Floyd & Barker*, K.B., 12 Co. 23, 77 Eng. Rep. 1305, 1307; *Case of the Marshalsea*, K.B., 10 Co. 68b, 77 Eng. Rep. 1027, 1035, 1038; 2 Cooley, Torts (4th ed.) §315; 48 C.J.S. §63, p. 1032.

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[3](Continued)
At the House Subcommittee hearing, Vernon L. West, then Corporation Counsel for the District of Columbia, told the subcommittee that he fully approved of the proposed statute "and, in fact, my office drafted the present bill."

Departure From the Accepted and Usual Course of Judicial Proceedings and Sanction of Such Departure by a Lower Court

A Committing Magistrate Is Not a Court

Although the Government is of the opinion that petitioner was properly committed to D. C. General Hospital by a committing magistrate pursuant to 24 D. C. 301, the Government has submitted no authority to show that a committing magistrate is a court. Yet 24 D. C. Code 301 specifies that "Whenever * * * it shall appear to the court * * * that the accused is of unsound mind * * * the court may order the accused committed to the District of Columbia General Hospital * * * ."

If a committing magistrate is not a court but nonetheless exercised judicial discretion in ordering petitioner committed to D. C. General Hospital, pursuant to 24 D. C. Code 301, all proceedings in the D. C. Court of General Sessions in which petitioner was involved were void *ab initio*, and, insofar as petitioner was denied a speedy trial, were unconstitutional. Sixth Amendment; 18 U.S.C. 3041; 11 D. C. 963(c); *Mance v. Cameron*, D.C. D.C., 260 F. Supp. 851. It is also established by statute (18 U.S.C. 3231; 11 D.C. Code 521) that the U.S. District Court has original jurisdiction of an offense against the laws of the United States where the punishment may be imprisonment for more than one year. (The offense for which petitioner was indicted is punishable, pursuant to 18 U.S.C. 876, by imprisonment for five years).

Historically the judicial authority of judges of the D. C. Court of General Sessions is that of justices of the peace, and no statute subsequent to 1801 has altered their

status. 2 Stat. 107, §11; 12 Stat. 580 §6; 31 Stat. 1190, §3; 35 Stat. 623, c. 134; 56 Stat. 190, c. 207; 76 Stat. 1171. Thus they are not immune to a civil action when they act without jurisdiction of the offense. By the same token prosecuting attorneys acting outside their jurisdiction cannot be protected by color of law, and when they so act they are liable for damages. *Cooper v. O'Connor*, 69 U.S. App. D. C. 100, 99 F.2d 135, 138; *Lewis v. Brautigam*, C.A. 5th, 227 F.2d 124, 127; *Suhre v. Knott*, C.C.A. Tex., 193 S.W. 417, 419 ("Whenever a wrongful prosecution is had and damage is caused to a man's reputation, to his person, or to his property, an action of malicious prosecution will lie.")[4]

From the words and acts of the Assistant United States Attorney in his successful attempt to effect petitioner's commitment to St. Elizabeths it would appear that the Government considers anyone insane whose conduct does not meet with its approval. According to the official transcript of the D. C. Court of General Sessions proceedings, petitioner on the witness stand was questioned by the Assistant United States Attorney, one Robert K. Webster, as follows:

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[4]Cf. Abe Fortas, *Concerning Dissent and Civil Disobedience*, 1968, p. 33:

> [Officers of the law] are subject to the rule of law, and if they exceed the authorized bounds of firmness and self-protection and needlessly assault the people whom they encounter, they should be disciplined, tried, and convicted. It is a deplorable truth that because they are officers of the state they frequently escape the penalty for their lawlessness.

Q. How do you feel it would further your purpose to continue your daughter's education to go to trial on these issues here?

A. The issue is very simple. The issue is: I wrote this letter to [FBI agent] Blazek knowing it was in violation of a Federal statute. It is my hope my being brought to trial on this issue will at least inspire [my daughter] to realize that we actually love her so much that we want her to go to college. I don't know how you get through to someone when someone else is obstructing a person; how do you get through a mother's love to a child?

Q. You still feel that way today?

A. Feel what way?

Q. That through going to trial as a result of deliberately writing a letter to the FBI and other letters to the environment in which your daughter lives, which letters are in violation of the law. By going to trial you will demonstrate to your daughter –

A. I have demonstrated.

Q. I am asking you if that is the way you feel today?

A. I would like to answer the question.

Q. I am asking you for a yes or no answer.

A. Yes.

MR. WEBSTER: I have no more questions.[5]

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[5]There was no element of extortion in the threatening letter, a copy of which petitioner sent to the FBI, and, inasmuch as petitioner was seeking, by writing the threatening letter, to restore to a heart-broken mother the child who had been taken from her, it is difficult to determine how petitioner's commitment to St. Elizabeths was supposed to assuage the mother's grief.

If, as petitioner infers, the Assistant United States Attorney was promising petitioner amnesty if petitioner would forego his right to trial, the Assistant United States Attorney's acts establish a dangerous precedent. In *Fletcher v. Fletcher*, Ell. & Ell. 420, 423-424, 120 Eng. Rep. 967, 968, Lord Chief Justice Campbell said:

> By the common law of England no person can be imprisoned as a lunatic unless he is actually insane at the time * * * It would place in jeopardy the liberty of many persons of eccentric habits, though in perfect possession of their faculties. There must be actual insanity to justify commitment. The defendant relies on the fact * * * that proper medical certificates had been given * * * That is no defense at common law; * * * while it protects duly authorized persons acting under certificates and an order for confinement of a lunatic, gives no protection to the person making the order, and therefore shows that he is not protected unless the person confined is actually insane.

The Superintendent's Liability

If a prosecuting attorney is not immune when he acts outside his jurisdiction, neither is the superintendent of a mental hospital when he executes a judgment of sentence of a court without jurisdiction. *Wise v. Withers; Elliott v. Peirsol; Dynes v. Hoover, supra;* 1 Cooley, Torts (4th ed.) §111, p. 357, citing *Telefsen v. Fee*, 168 Mass. 188, 46 N. E. 562, 564:

> An officer is bound to know the law, and to know the jurisdiction of the court whose officer he is. * * * If, therefore, * * * the court has no jurisdiction in the matter * * * it would seem that the officer is not protected. There are many authorities to this effect. [Cited are ten cases].

In *Van Deusen v. Newcomer*, 40 Mich. 90, 136-137, where the superintendent (Van Deusen) had executed the commitment order of a magistrate, Mr. Justice Cooley said:

> [T]he question * * * must be whether the superintendent was vested with any authority to pass judgment upon [defendant in error's] sanity in a manner that can protect him. * * * I need say no more than this, that neither the constitution nor the statute has undertaken to give him the authority, nor in my opinion could it be given to him or to any other tribunal with the privilege of proceeding secretly, and without giving the alleged *non campos* and his friends the opportunity to produce evidence to show that the allegation of insanity was unfounded. The privilege of defending the intellect is as sacred as the privilege of defending life itself, and it is not to be lightly assumed that the Legislature has ever intended to confer it upon a single officer *ex parte*. The powers actually conferred upon this office are clearly administrative and limited, and like all corresponding officers, he must at his peril keep within their limits.[6]

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[6] At pp. 127-128, Mr. Justice Cooley said:

> I cannot admit that because one is a practitioner of medicine, it is therefore proper or safe to suffer him to decide upon mental disease, and consign people to the asylum upon his judgment or certificate. While the high character of a large proportion of the medical profession, their learning, their self-devotion and humanity, entitle them to our highest respect and confidence, and give to their conclusions in questions of medical science a weight that must generally challenge conviction, we cannot for a moment shut out from view the fact that the law

(Continued)

In the opinions below it is held that the United States is not liable for negligent and wrongful acts of Government employees acting within the scope of their employment. In his complaint for cruel and unusual punishment and negligent treatment petitioner alleged that, although guiltless of crime, he had been confined at St. Elizabeths Hospital in an old and dilapidated building with divers diseased and disordered persons without any reasonable or probable cause whatsoever and that while petitioner was imprisoned he became critically ill with pneumonia and physicians of the said hospital administered to petitioner an anti-depressant drug which seriously aggravated petitioner's condition.

Petitioner's action, however, was dismissed on motion of the Government, which dismissal is contrary to the provisions of 28 U.S.C. 1346(b) and 28 U.S.C. 2674, and this Court's opinion in *Indian Towing Co. v. United States*, 350 U.S. 61, 69.

Although petitioner's actions were dismissed by the District Court for failure to state a claim upon which relief could be granted it would appear from innumerable court opinions that petitioner stated valid claims in his actions against *Greene et al.* (malicious prosecution), *Cameron* (false imprisonment), and the *United States*

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[6](Continued)

throws wide open the doors of that profession, and that the ignorant jostle the learned in entering it, the unworthy have equal rights with the high-minded and humane, and it is not uncommon that the most unfit succeed for a long period in imposing on the public. By no means known to the existing laws can it be rendered reasonably certain that, in the absence of public investigation, questions of insanity will be considered by competent persons and mistakes guarded against by those who are fit to judge.

(cruel and unusual punishment and negligent treatment), and that, if he was improperly committed to St. Elizabeths by a court without jurisdiction, he has a valid claim for deprivation of his civil rights pursuant to 42 U.S.C. 1983.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in these causes and this Court should review and reverse the judgment of the Court of Appeals.

JOHN F. GRAHAM
1914 Connecticut Avenue, N. W.
Washington, D. C.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN F. GRAHAM

v.

THE HON. HAROLD H. GREENE
THE HON. CATHERINE B. KELLY
THE HON. TIMOTHY MURPHY
DALE C. CAMERON, M. D.
UNITED STATES OF AMERICA

[Filed May 2, 1968]

JUDGMENT

Appeals from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Senior Circuit Judge, and McGowan and Tamm, Circuit Judges.

These cases came to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by the court that the respective judgments of the District Court appealed from in each of the above-entitled cases are confirmed.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN F. GRAHAM

v.

THE HON. HAROLD H. GREENE
THE HON. CATHERINE B. KELLY
THE HON. TIMOTHY MURPHY

[Filed September 22, 1967]

JUDGMENT

This cause having come before the Court on defendants' motions to dismiss; on plaintiff's motion for summary judgment; and on plaintiff's motion for production, etc.; the matter having been argued; and the Court being fully advised in the premises,

It is by the Court this 22nd day of September, 1967:

ORDERED, ADJUDGED AND DECREED:

1. That defendants' motions to dismiss be, and hereby are, granted, and,

2. That plaintiff's motion for summary judgment and motion for production, etc., be, and hereby are, denied, and this action is dismissed.

s/ Alexander Holtzoff
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN F. GRAHAM

v.

DALE C. CAMERON, M.D.

[Filed September 22, 1967]

JUDGMENT

This cause having come before the Court on defendant's motion to dismiss or for summary judgment; and on plaintiff's motion for summary judgment; the matter having been argued; and the Court being fully advised in the premises,

It is by the Court this 22nd day of September, 1967,

ORDERED, ADJUGED AND DECREED:

1. That defendant's motion to dismiss be, and hereby is, granted; and

2. That plaintiff's motion for summary judgment be, and hereby is, denied, and this action be dismissed.

s/ Alexander Holtzoff
United States District Judge

B-3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN F. GRAHAM

v.

UNITED STATES OF AMERICA

[Filed September 22, 1967]

JUDGMENT

This cause having come before the Court on defendant's motion to dismiss or for summary judgment; and on plaintiff's motion for summary judgment; the matter having been argued; and the Court being fully advised in the premises.

It is by the Court this 22nd day of September, 1967,

ORDERED, ADJUDGED AND DECREED:

1. That, insofar as recovery is sought for alleged "cruel and unusual punishment" and "imprisonment", defendant's motion to dismiss be, and hereby is, granted;

2. That, insofar as recovery is sought for alleged "negligent treatment", defendant's motion for summary judgment be, and hereby is granted; and

3. That plaintiff's motion for summary judgment be, and hereby is, denied, and this action is hereby dismissed.

s/ Alexander Holtzoff
United States District Judge

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

Article III, Section 2: The judicial power [of the United States] shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority * * * U.S.C., Vol. 1, p. xliv-xlv.

Article IV, Section 2: The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. * * * U.S.C., Vol. 1, p. xlv.

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S.C., Vol. 1, p. xlvi.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; and to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Eighth Amendment: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S.C., p. xlvi.

Fourteenth Amendment, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C., Vol. 1, p. xlvii.

UNITED STATES CODE

18 U.S.C. 876: Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Post Office Department or knowingly causes to be delivered by the Post Office Department according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnapped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both. * * * Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both * * U.S.C., Vol. 4, p. 3585.

18 U.S.C. 3041: For any offense against the United States the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of the supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where the offender may be found, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such court, together with the recognizances of the witnesses for their appearances to testify in the case. A United States judge or commissioner shall proceed under this section according to rules promulgated by the Supreme Court of the United States. Any State judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his State but his acts and orders shall have no effect beyond determining to hold the prisoner for trial or to discharge him from arrest. U.S.C., Vol. 4, p. 3679.

18 U.S.C. 3231: The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the court of the several States under the laws thereof. U.S.C., Vol. 4, p. 3691.

18 U.S.C. 4244: Whenever after arrest and prior to the period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or

properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency to the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. * * * U.S.C., Vol. 4, p. 3729.

28 U.S.C. 1346(b): Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. U.S.C. Vol. 7, p. 5970.

28 U.S.C. 2674: The United States shall be liable respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to the judgment or for punitive damages.

42 U.S.C. 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

DISTRICT OF COLUMBIA CODE

11 D. C. Code 521(a): Except in actions or proceedings over which exclusive jurisdiction is conferred by law upon other courts in the District, the United States District Court for the District of Columbia, in addition to its jurisdiction as a United States district court and to any other jurisdiction conferred by law, has all the jurisdiction possessed and exercised by it on January 1, 1964, and has original jurisdiction of all: (1) civil actions between parties, where either or both of them are resident or found within the District; and (2) offenses committed within the District. D. C. Code, Vol. 1, p. 609.

11 D. C. Code 963(c): In all cases, whether cognizable in the Court of General Sessions or in the District Court, the Court of General Sessions has jurisdiction to make preliminary examination and commit offenders or grant bail in bailable cases, either for trial or further examination. D. C. Code, Vol. 1, p. 657.

24 D. C. Code 301(a): Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after

such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after a hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined in a hospital for the mentally ill. D. C. Code, Vol. 2, p. 1259.

UNITED STATES STATUTES AT LARGE

2 Stat. 107, §11: That there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace, as the President of the United States shall from time to time think expedient, to continue in office for five years, and such justices, having taken an oath for the faithful and impartial discharge of the duties of the office, shall in all matters, civil and criminal, and whatever relates to the conservation of the peace, have all the powers vested in, and shall perform all the duties required of, justices of the peace, as individual magistrates, by the laws herein before continued in force in those parts of said district, for which they shall have been respectively appointed.

* * *

12 Stat. 580–581, §6: That the said Board of Police shall have power, and it shall be their duty, from time to time, to select and employ, from among the

duly appointed and qualified justices of the peace from the county of Washington, such justice or justices as may be required, and as it may deem proper, to sit in the respective station houses for the hearing of such charges as may be brought against persons arrested and carried to said station houses, and every person who shall be sentenced to pay a fine and costs, or either shall satisfy the same before being released by payment or by giving security to the satisfaction of the justice imposing such fine and costs. And when such security shall be taken, the justice shall be personally liable to said Board of Police for the amount of the fine and costs to be collected of him as in debt due and payable.

31 Stat. 1190, §3: There shall be ten justices of the peace in the District, who shall be appointed by the President of the United States, by and with the advice and consent of the Senate, for a term of four years, unless sooner removed as provided by law: *Provided*, That no person shall be appointed to said office unless he shall have been a bona fide resident of said District for the continuous period of at least five years immediately preceding his appointment, and shall either have held the office of justice of the peace in said District for a period of at least two years or shall have been engaged in the active practice of law before the Supreme Court of the District for a period of at least five years prior to his appointment * * *.

35 Stat. 623, c. 134: That the inferior court known as "justices of the peace" in the District of Columbia shall remain as now constituted, but shall hereafter be known as "the Municipal court of the District of Columbia." It shall consist of the present justices of the peace of said District, who shall serve as the judges of said court for the unexpired terms of their now existing commissions,

and who shall not be required to be recommissioned for such unexpired terms. Thereafter, and upon the expiration of the commission of any said members, his successor shall be appointed by the President of the United States, by and with the advice and consent of the Senate, for a term of four years, unless sooner removed as provided by law. * * * The said court and each member thereof shall exercise the same jurisdiction as was vested in them as justices of the peace immediately before the passage of this Act, and no more, and shall be governed by the laws then in force, except as said laws and said jurisdiction are expressly changed or enlarged thereon.

56 Stat. 190–191, c. 207, §1: That the Police Court of the District of Columbia and the Municipal Court of the District of Columbia, be, and they are hereby, consolidated into a single court to be known as "The Municipal Court for the District of Columbia". The Court shall consist of ten judges appointed by the President with the advice and consent of the Senate, one of whom shall be designated by the President as chief judge. The terms of the judges shall be in accordance with the following schedule: The first two appointments shall be for a term of ten years each; the second two appointments shall be for a term of eight years each; and the remaining six appointments shall be for a term of six years each. The judges of the Police and Municipal Courts of the District of Columbia holding office on the effective date of this Act shall, however, serve as judges of The Municipal Court for the District of Columbia hereby created until the expiration of their respective commissions and until their successors are appointed and qualified.The Court shall adopt and have a seal, and shall be a court of record.

76 Stat. 1171, §1: That the court established by the first section of this Act entitled "An Act to Consolidate the Police Court of the District of Columbia and the Municipal Court of the District of Columbia, to be known as 'the Municipal Court for the District of Columbia', to create 'the Municipal Court of Appeals for the District of Columbia', and for other purposes", approved April 1, 1942, as amended (56 Stat. 190; D. C. Code, sec. 11–751), hereafter shall be known as "the District of Columbia Court of General Sessions." Whenever reference is made in any Act of Congress (other than this Act or the amendments made by this Act) or in any regulation to the Municipal Court for the District of Columbia, such reference shall be held to be a reference to the District of Columbia Court of General Sessions.

In the Supreme Court of the United States

OCTOBER TERM, 1965

JOHN F. O'BRIEN, PETITIONER

v.

HAROLD H. GREENE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS TIMOTHY MURPHY, DR. ISAAC C. CAMERON AND THE UNITED STATES OF AMERICA IN OPPOSITION

MELVIN M. GREENWALD
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 359

JOHN F. GRAHAM, PETITIONER

v.

HAROLD H. GREENE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS TIMOTHY MURPHY, DR. DALE C. CAMERON AND THE UNITED STATES OF AMERICA IN OPPOSITION

1. Petitioner seeks $1,150,000 damages allegedly resulting from his arrest on charges of sending threatening communications through the mails and his commitment to the District of Columbia General Hospital for mental observation and to St. Elizabeth's Hospital as one incompetent to stand trial. The respondents are three judges of the Court of General Sessions of the District of Columbia,[1] the Superintendent

[1] Judge Murphy was, at the time alleged in the complaint, the Chief of the General Sessions Division of the United States

of St. Elizabeth's Hospital and the United States of America. Originally commenced as three separate actions, the cases were consolidated on appeal by a *sua sponte* order of the Court of Appeals for the District of Columbia Circuit.

Petitioner was arrested on a warrant issued by respondent Judge Greene on the basis of a complaint charging petitioner with having sent through the mails letters threatening the life of his son-in-law. He was brought before Judge Greene on November 30, 1965, and, after a hearing at which he was represented by counsel, petitioner was committed to the District of Columbia General Hospital for thirty days for observation pursuant to 24 D. C. Code 301(a). Shortly thereafter, competency hearings were held before respondent Judge Kelly. She found that petitioner was not capable of understanding the charges against him or participating in his defense and committed him to St. Elizabeth's Hospital for treatment until such time as he was competent to stand trial.[2] Petitioner remained at St. Elizabeth's Hospital until at hearings in May 1966 it was determined that he was then competent to stand trial. Petitioner was then arraigned and re-

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Attorney's office for the District of Columbia. It is for action taken by him in that capacity that petitioner seeks recovery. Judges Greene and Kelly are being represented by the District of Columbia Corporation Counsel and a separate brief in opposition is being filed in their behalf.

[2] This was in full accord with the established authorized practice at the time. See *Mance* v. *Cameron*, 260 F. Supp. 851 (D.D.C.).

leased on his own recognizance. The indictment was subsequently dismissed on the government's motion.

Petitioner then brought suit against the individual respondents charging, in essence, false imprisonment, malicious prosecution, libel, and deprivation of civil rights. The complaint against the United States alleged various deprivations of civil liberties resulting from his confinement and medical malpractice in connection with his alleged treatment for pneumonia while confined at St. Elizabeth's. The district court dismissed the actions and the court of appeals affirmed.

2. It has long been recognized that federal officials must be free to perform their official duties without fear that they may be subjected to tort liability therefor. This Court has thus consistently held that they may not be held personally liable for acts committed within the general scope of their official authority in pursuance of their official duties. *E.g., Barr* v. *Matteo,* 360 U.S. 564; *Howard* v. *Lyons,* 360 U.S. 593. Here the individual respondents were acting well "within the outer perimeter of [their] line of duty," *Barr* v. *Matteo, supra,* 360 U.S. at 575.

3. Petitioner's tort claim against the United States is, in essence, that he was wrongfully confined. But this is not a ground upon which the United States has consented to be sued. 28 U.S.C. 2680 (a), (h). Moreover, the record shows that the district court correctly dismissed the complaint, since petitioner's charges were unsubstantiated. Petitioner's contention

that he was improperly treated for pneumonia at St. Elizabeth's was totally refuted by the medical records of the hospital and an affidavit of one of the staff physicians which showed that petitioner was never treated for pneumonia while at the hospital.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1968.

U.S. GOVERNMENT PRINTING OFFICE, 1968

BRIEF FOR RESPONDENTS GREENE AND KELLY IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 359

JOHN F. GRAHAM, *Petitioner*,

v.

THE HON. HAROLD H. GREENE,
THE HON. CATHERINE B. KELLY,
THE HON. TIMOTHY MURPHY,
DALE C. CAMERON, M. D.,
and
THE UNITED STATES OF AMERICA, *Respondents*.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 359

JOHN F. GRAHAM, *Petitioner*,

v.

THE HON. HAROLD [illegible] GREENE,
THE HON. CATHERINE B. KELLY,
THE HON. TIMOTHY MURPHY,
DALE C. CAMERON, M. D.,
and
THE UNITED STATES OF AMERICA, *Respondents.*

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS GREENE AND KELLY IN OPPOSITION

QUESTION PRESENTED

Were not respondents Greene and Kelly acting under color of their jurisdiction as Judges in the District of Columbia Court of General Sessions in committing petitioner to hospitals for mental examination and are they not, accordingly, immune from civil liability for their actions?

COUNTER-STATEMENT OF THE CASE

On May 24, 1967, petitioner instituted three related tort actions in the United States District Court for the District of Columbia; one against Dale C. Cameron, the Superintendent of Saint Elizabeths Hospital (Civil Action No. 1280–67); another against the United States of America (Civil Action No. 1283–67); and the third against District of Columbia Court of General Sessions Judges Harold H. Greene and Catherine B. Kelly, and then Assistant United States Attorney Tim Murphy (Civil Action No. 1279–67).[1] The actions stemmed from petitioner's arrest on charges of using the mails to send threatening communications (18 U.S.C. § 876) and his subsequent commitment, first to the District of Columbia General Hospital for mental observation to determine his competency to stand trial, and thereafter to Saint Elizabeths Hospital until such time as he was restored to competency to stand trial. *(United States* v. *John F. Graham,* Criminal Case No. 218–66.*)*

Introduction and Background

Petitioner's arrest and commitment for mental observation emanated from threats made by him after the marriage of his daughter, Sheryl, to one Herbert Gerald Hartman. These threats included letters to the young man's mother, Mrs. E. G. Hartman of Barstow, California, and to the young man's father, Mr. H. G. Carpenter of Louisville, Kentucky. To Mrs. Hartman, the mother, petitioner wrote: "It is beginning to look as if, in signing the marriage license application for Sheryl and your son, you signed your son's death warrant. I have written to Sheryl that if she does not start conforming to what her mother wants I fully intend to put a slug into your son.

[1] The office of the Corporation Counsel represents Judges Greene and Kelly only and for this reason will address itself to the petition for a writ of certiorari only as it affects these respondents.

Sheryl will tell you that I do not make rash threats * * *." Petitioner closed with the words: "If Sheryl is not out of Barstow by December 1, and at least 500 miles away from where you reside, your son, I assure you, will be living on borrowed time."

To Mr. Carpenter, the father, petitioner wrote: "It is a matter of great regret to me that Mrs. E. F. Hartman is proving so intractable that I may have to resort to violence. I cannot justifiably harm Mrs. Hartman, but I can shoot your son, which I am, if necessary, perfectly willing to do." He continued: "As Sheryl will tell you, I have both a long memory and considerable skill with a .38 revolver, and I also keep my promises."

In a communication dated November 12, 1965, to FBI Agent John Blazek, in which he enclosed copies of these threatening letters, petitioner stated: "I am not bluffing when I say that unless my daughter promptly conforms to her mother's dictates * * * I plan to put a slug into her husband." He ended his letter to Agent Blazek with the following statement:

> "I most certainly do not endorse personal violence, but I am quite willing to exercise it if the integrity of the family can be protected in no other way. The only antidote to personal violence is effective laws and in this area we definitely do not have them."

Petitioner's Arrest and Commitment for Mental Observation

On the basis of the communication of November 12, 1965, from petitioner to Agent Blazek and Agent Blazek's affidavit that he had received such communication, respondent Greene on November 30, 1965, issued a warrant for petitioner's arrest charging him with mailing threatening communications in violation of 18 U.S.C. § 876.

Pursuant to this warrant, petitioner was, that same day, arrested and brought before Judge Greene. After a hearing in open court at which petitioner was represented by appointed counsel, Judge Greene, on motion of the Government, ordered that petitioner be committed to the District of Columbia General Hospital pursuant to 24 D. C. Code, § 301(a), for a period of thirty days for mental observation to determine his competence to stand trial.

The Initial Competency Hearing

On December 30, 1965, and January 4, 1966, a lengthy competency hearing was held before General Sessions Judge Kelly. Doctors Luke F. Grande, Malcolm L. Meltzer and Sheldon Boruchow, of D. C. General Hospital, testified that petitioner was then incompetent to stand trial. Petitioner, represented by two appointed counsel, relied on the testimony of his wife and one Hazel Oldaker, described as a long time family friend, both of whom attested to his competence to stand trial. Petitioner himself also so testified. The Government put into evidence excerpts from several of the threatening letters written and sent by petitioner.

Judge Kelly found petitioner unable to understand the charges against him and incapable of participating in his own defense. Petitioner was ordered committed to Saint Elizabeths Hospital until such time as he was restored to mental competency to stand trial.

Further Proceedings in the Criminal Case

On May 16, and May 23, 1966, a second competency hearing was held in the United States District Court for the District of Columbia. At this hearing there was psychiatric testimony that petitioner's mental condition had improved substantially and that he was able to assist and cooperate in his defense. Petitioner was, accordingly,

found competent to stand trial. Petitioner was then, on May 23, 1966, arraigned, a trial date was set, and he was released on his own personal recognizance. Thereafter, on October 19, 1966, on oral motion of the Government, the indictment against the petitioner was dismissed.

Proceedings in District Court Tort Action

In his complaint in Civil Action No. 1279–67, petitioner alleged that, in committing him to the District of Columbia General Hospital, respondent Greene acted "wrongfully, wantonly, and maliciously." Petitioner made like allegations respecting his subsequent commitment to Saint Elizabeths Hospital by respondent Kelly, and sought damages in the amount of $450,000 from each respondent.

Respondents moved to dismiss the complaint. Petitioner opposed their motion and moved the court to enter summary judgment in his behalf. On September 22, 1967, the District Court entered an order granting respondents' motion to dismiss the complaint and denying petitioner's motion for summary judgment (Petitioner's appendix B–1). The United States Court of Appeals for the District of Columbia Circuit affirmed (Petitioner's appendix A). Petitioner thereafter filed in this Court a petition for a writ of certiorari.

ARGUMENT

Petitioner has failed to present any question of substance warranting the exercise of this Court's jurisdiction.

The record does not disclose any ground for review conceivably falling within the standards and considerations prescribed by Rule 19 of the Rules of this Court governing review on writ of certiorari. The case involves an action for damages against two judges of the District of Columbia Court of General Sessions for alleged wrongful acts in connection with the discharge of their judicial functions. In committing petitioner, first for mental exam-

ination, and thereafter on the ground that he was mentally incompetent to defend in a criminal prosecution, respondents Greene and Kelly acted pursuant to statutes of purely local application, namely, § 24–301(a), D. C. Code, 1967, and § 11–963(c), D. C. Code, 1967. (See appendix, *infra*, pp. 1a, 2a.) Such judicial actions were consistent with a long-standing practice engaged in throughout the years by Judges in the Court of General Sessions.[a]

The decision of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court's ruling in favor of Judges Greene and Kelly accords with the decisions of this Court and with countless decisions of Circuit Courts of Appeals. These cases make it crystal clear that judges such as respondents are immune from civil actions for damages arising out of the performance of their official acts, without regard to the motives with which such acts were performed, as long as they act with some color of jurisdiction over the parties and subject matter. See *Pierson* v. *Ray*, 386 U. S. 547, 553–54 (1967); *Bradley* v. *Fisher*, 13 Wall. 335 (1872); cf. *Cooper* v. *O'Connor*, 69 App. D. C. 100, 99 F. 2d 135, 118 A. L. R. 1440 (1938); *Fletcher* v. *Wheat*, 69 App. D. C. 259, 100 F. 2d 432 (1938); *Spruill* v. *O'Toole*, 64 App. D. C. 85, 74 F. 2d 559 (1934); *Steinpreis* v. *Shook*, 377 F. 2d 282 (4th Cir., 1967); *Carmack* v. *Gibson*, 363 F. 2d 862 (5th Cir., 1966); *O'Bryan* v. *Chandler*, 352 F. 2d 987 (10th Cir., 1965); *Heasley* v. *Davis*, 342 F. 2d 786 (8th Cir., 1965); *Agnew* v. *Moody*, 330 F. 2d 868 (9th Cir., 1964); *Hurlburt* v. *Graham*, 323 F. 2d 723 (6th Cir., 1963); *Sires* v. *Cole*, 320 F. 2d 877 (9th Cir., 1963); *Meredith* v. *Van Oosterhout*, 287 F. 2d 216 (8th Cir.,

[a] From 1936 to 1962, 194 accused felons were committed by General Sessions Judges, under § 301(a), to Saint Elizabeths Hospital as incompetent to stand trial. See "Report of the Committee on Problems Connected with Mental Examinations of the Accused in Criminal Cases Before Trial," Judicial Conference of the District of Columbia Circuit, 1964, at 49.

1960); *Ryan* v. *Scoggin*, 245 F. 2d 54 (10th Cir., 1957); *Ray* v. *Huddleston*, 212 F. Supp. 343 (D. C. W. D. Ky., 1963), aff'd. 327 F. 2d 61 (6th Cir., 1964). The case, considered in light of this background, cannot be converted into a constitutional matter of a magnitude sufficient to warrant the exercise of this Court's jurisdiction.

CONCLUSION

Upon the foregoing it is respectfully submitted that the petition for a writ of certiorari should be denied.

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§ 11-963. Criminal Jurisdiction; commitment

* * * * *

(g) In all cases, whether cognizable in the Court of General Sessions or in the District Court, the Court of General Sessions has jurisdiction to make preliminary examination and commit offenders or grant bail in bailable cases, either for trial or for further examination.

* * * * *

§ 24-301. Commitment of persons of unsound mind to the District of Columbia General Hospital — Certification to the court — Acquittal by jury on grounds of insanity — Confinement in a mental institution — Conditions for release after confinement — Conditional release — Expenses — Writ of habeas corpus — Inconsistent provisions of Federal Statutes superseded.

(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the

psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.

No. 359

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SUPREME COURT, U. S.

OCT 1968

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IN THE

Supreme Court of the United States

October Term, 1968

JOHN F. GRAHAM,

Petitioner,

v.

THE HONORABLE HAROLD H. GREENE,
THE HONORABLE CATHERINE B. KELLY,
THE HONORABLE TIMOTHY MURPHY,
DALE C. CAMERON, M.D.,
UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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Washington, D.C.

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REPLY BRIEF OF PETITIONER

In response to the petitioner's petition for a writ of certiorari the Solicitor General has filed a memorandum in behalf of respondents Murphy, Cameron and the United States, and the District of Columbia Corporation Counsel has filed a brief in behalf of respondents Greene and Kelly. Both the memorandum and the brief oppose granting of the petitioner's petition, which petition is predicated chiefly on four propositions, to wit:

1. A committing magistrate is not a court and therefore is prohibited by statute from doing more than discharging the prisoner or holding him for trial;
2. A state or municipal court does not have jurisdiction of an offense against the laws of the United States;
3. Where a court usurps judicial authority all proceedings are rendered *coram non judice;*
4. A judicial officer acting outside the scope of his authority is liable to the injured party.

In the brief for respondents Greene and Kelly the respondents suggest to the Court that the petitioner's case cannot be converted into a constitutional matter of a magnitude sufficient to warrant the exercise of this Court's jurisdiction. The petitioner submits that commitment to a mental institution for exercising *freedom of speech* is a denial of *freedom from cruel and unusual punishment;* that commitment to a mental institution for six months prior to arraignment is a denial of the right to a *speedy trial,* and that commitment to a mental institution by a court without jurisdiction of the offense is a violation of *due process* and *equal protection* and a denial of constitutionally guaranteed *privileges and immunities.* These constitutional rights are fundamental to a democratic government, and it is the petitioner's position that the courts do not have the authority to abrogate them; indeed it is the courts' duty to preserve them.

Following his arrest pursuant to 18 U.S.C. 876 (which provides that mailing threatening letters is punishable by five years' imprisonment) the petitioner, pursuant to Rule 5(a), Federal Rules of Criminal Procedure, was taken before a judge of the District of Columbia Court of General Sessions who was sitting as a committing magistrate. Although it is provided by 18 U.S.C. 3041 that the acts and orders of such a magistrate shall have no effect be-

yond determining to hold the prisoner for trial or to discharge him from arrest, the petitioner was ordered committed to D.C. General Hospital for a 30-day period of observation. At the end of the 30-day period the petitioner was, by a court having no jurisdiction of the offense, ordered committed to St. Elizabeths Hospital as incompetent to stand trial.[1]

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[1]The petitioner was arrested and imprisoned on November 30, 1965; indicted on February 24, 1966, and arraigned on May 23, 1966, when, following a not guilty plea, he was released on his own recognizance. On motion of the Government the indictment was dismissed on October 19, 1966. Because the petitioner was confined in St. Elizabeths he did not appear for a scheduled arraignment on March 11, 1966, and, because the District Court did not know the whereabouts of the petitioner, the District Court on that date issued a bench warrant for his apprehension. Cf. *Stack v. Boyle*, 342 U.S. 1, 4 (1951), where Mr. Chief Justice Vinson said:

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See *Hudson v. Parker*, 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

By an unhappy coincidence the petitioner was committed to St. Elizabeths Hospital while the quite substantial estate of petitioner's mother was in the process of being settled. Needless to say, relatives of the petitioner who were also legatees of the estate were not unduly grieved when the petitioner was declared incompetent by the Government's psychiatrists. The question raised thereby is deprivation of property without due process.

It is the petitioner's position that the act of ordering the commitment of the petitioner to D.C. General Hospital, instead of holding him for trial in the United States District Court or discharging him from arrest, rendered *coram non judice* all the proceedings in which the petitioner was involved.[2] The respondents make the claim that they are protected from tort liability by official immunity. The fact is, however, that neither judges nor ministerial officers are protected by official immunity when acting beyond the scope of their authority. As it was observed by the United States Court of Appeals for the District of Columbia Circuit in *Cooper v. O'Connor,* 69 U.S. App. D.C. 100, 102-103; 99 F.2d 135, 137-138 (1938):

> There is a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action and cannot claim the immunity of the sovereign. There is also a general rule that if any officer – ministerial or otherwise – acts outside the scope of his jurisdiction and without authorization of law, he is liable in an action for damages for injuries suffered by a citizen, as a result thereof. See *Bradley v. Fisher,* 13 Wall. 335, 351-352, 20 L.Ed. 646.

From the respondents' statement that, between 1956 and 1962, 194 accused felons were committed to St. Elizabeths Hospital by the D.C. Court of General Sessions, the respondents appear to be arguing that prior usurpation of authority is a justification for their acts. It is a maxim

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[2] Cf. *Martin v. Hunter's Lessee,* 1 Wheat. (14 U.S.) 304, 364 (1816), where Mr. Justice Johnson said:

> It is an acknowledged principle of, I believe, every court in the world, that not only the decisions, but everything done under the judicial process of courts, not having jurisdiction are, *ipso facto,* void.

of law that what from the beginning is invalid, the passage of time cannot correct.[3] Inasmuch as three of the respondents are presently municipal court judges, their apparent unfamiliarity with the statutes establishing the D.C. Court of General Sessions as a misdemeanor court does not seem appropriate.

The petitioner, who was accused of a felonious offense against the laws of the United States, contends that he was properly taken before a committing magistrate, but that the committing magistrate improperly ordered him committed for 30 days to D.C. General Hospital in violation of 18 U.S.C. 3041 and Article IV, Sec. 2, of the Constitution (equal privileges and immunities), Fifth Amendment (due process), Sixth Amendment (speedy trial) and Fourteenth Amendment (equal protection). The respondents, however, argue that the petitioner was properly committed to D.C. General Hospital pursuant to 24 D.C. Code 301(a). From this argument it can be inferred that the commitment to D.C. General Hospital was ordered, not by a committing magistrate, but by a judge of the D.C. Court of General Sessions.[4]

The respondents, the petitioner submits, cannot have it both ways. Either the petitioner's commitment to D.C. General Hospital was ordered by a committing magistrate, in which case the committing magistrate was

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[3]Cf. *Le Case de Tanistry (Mac Brien v. O'Callaghan)*, Davis 28, 32; 80 Eng. Rep. 516, 520 (1608):

> [S]i fuit unreasonable en le originall, nul usage ou continuance poet faire ceo bon. Quod ab initio non valuit, tractu temporis non convalescet.

[4]Cf. *Martin v. Hunter's Lessee, supra,* at 336, where Mr. Justice Story said:

> No part of the *criminal jurisdiction* of the United States can, consistently with the constitution, be delegated to

(Continued)

bound by 18 U.S.C. 3041, or, if 24 D.C. Code 301(a) was invoked to commit the petitioner to D.C. General Hospital, the committing magistrate was improperly exercising the authority of a judge of the D.C. Court of General Sessions. In other words, if the commitment was ordered pursuant to a District of Columbia statute, the act was that of a judge of the D.C. Court of General Sessions and, inasmuch as the petitioner was arrested for a Federal offense, such act was *ipso facto* void.[5]

The petitioner is contending that he was deprived of his civil rights and that an action lies against the respondents pursuant to 42 U.S.C. 1983. According to successive Acts of Congress (2 Stat. 107; 12 Stat. 580-581; 12 Stat. 764; 31 Stat. 1190; 35 Stat. 623; 56 Stat. 190; 76 Stat. 1171), it was never intended that the judges of the District of Columbia Court of General Sessions should have greater judicial authority in criminal matters than that of justices of the peace. It would appear, however,

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[4](Continued)

> State tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the Judiciary Act, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition, that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts.

[5]In respect to the respondent United States, the petitioner's tort claim is *not*, as alleged [illegible] the respondents, that he was wrongfully confined. The gist of the complaint is that the petitioner was subjected to treatment in violation of accepted medical practice; specifically, the administration of a relatively new and potent drug with

(Continued)

that the respondents are asking the Court to permit inferior courts to take jurisdiction of felonies, including those committed against the laws of the United States.[6]

Due process is the essence of liberty, and if due process is the doctrine by which the individual is protected from the tyranny of government, it is the doctrine, too, by which the integrity of government is preserved. As Dean Griswold[7] said some fourteen years ago:

> [T]he essence of liberty * * * is the freedom of the individual from the arbitrary power of governmental authority. When we see more clearly that our present problem is simply one of due process of law in its pervasive sense * * * we will have no difficulty finding a satisfactory solution which will recognize and preserve the basic rights of individuals while providing ample protection for the state.

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[5](Continued)
26 possible side effects, all but two of which were apparently unknown to the respondent. The petitioner further claimed that confinement in a hospital for the insane when the respondent knew the petitioner not to be insane constitutes cruel and unusual punishment. It is doubtful that the United States District Court, as alleged by the respondent, dismissed the complaint because the petitioner's charges were unsubstantiated; it being beyond the purview of any court, on a motion to dismiss, to decide controverted issues of fact.

[6]Cf. Edward Coke, Milite, *The Second Part of the Institutes of the Lawes of England* (London, 1642), c. 29, p. 48:

> Every oppression against law by colour of any usurped authority is a kind of destruction, for *Quando aliquid prohibetur, prohibetur & omne, per quod devenitur ad illud:* And it is the worst oppression that is done by the colour of justice.

[7]Ervin N. Griswold, *The 5th Amendment Today* (Cambridge, 1955), p. 51.

It would appear that due process has four purposes: (1) to protect the individual from the tyranny of the Government; (2) to protect society by the assurance that criminals will not escape the consequences of their acts; (3) to uphold the dignity of the Government; (4) to protect the Government from those who would subvert it by the manipulation of its laws. Much has been said in recent months about law and order, but if the courts cannot be relied upon to conform to the law, the law itself must fall into disrepute, with ultimate detriment to our country. For this reason, above all, the petitioner prays the Court to reverse the judgment of the United States Court of Appeals.

Respectfully submitted,

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

JOHN F. GRAHAM, pro se
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PETITION FOR REHEARING

Pursuant to Rule 58(2) of the Rules of this Court the petitioner petitions the Court for a rehearing of a denial of a petition for a writ of certiorari. It is certified that this petition is submitted in good faith and not for delay and states substantial grounds available to the petitioner, although not previously presented.

In this petition the petitioner propounds three propositions, to wit: That it is cruel and unusual punishment and a deprivation of civil rights where (1) involuntary medical treatment is imposed on a prisoner accused of but not shown to have committed a crime; (2) involuntary medical treatment is imposed on an individual over the opposition of the individual and/or his nearest of kin; (3) a person is compelled to accept involuntary medical treatment from a physician of a race, religion and/or national origin disparate from that of the person being treated.

I

Although the indictment was eventually dismissed on the Government's motion, the petitioner was imprisoned for six months in the D. C. General Hospital and St. Elizabeths Hospital after he was arrested for mailing threatening communications, and it is cruel and unusual punishment and a deprivation of civil rights where involuntary medical treatment is imposed on a prisoner accused of but not shown to have committed a crime.

In the District of Columbia it is customary, pursuant to 24 D. C. Code §301(a), to impose involuntary medical treatment on persons arrested for misdemeanors and felonies.[1] Indeed, the statute as enacted specifically authorized such treatment. (H.R. Report No. 892, June

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[1] See Brief of Respondents Greene and Kelly in Opposition, page 6, note 3:

> From 1936 [1956?] to 1962, 194 accused felons were committed by General Sessions Judges, under §301(a), to Saint Elizabeths Hospital as incompetent to stand trial. See "Report of the Committee on Problems Connected with Medical Examinations of the Accused in Criminal Cases Before Trial," Judicial Conference of the District of Columbia Circuit, 1964, at 49. (Cont'd)

22, 1955, p. 1.) Testifying before a Senate Subcommittee in favor of H.R. 6585 (S. 2274), later to become 24 D. C. Code §301(a),[2] Dr. Winfred Overholser, then superintendent of St. Elizabeths Hospital, said:

> [If] a person is acquitted by reason of insanity, he will be, not may be, will be sent to St. Elizabeths Hospital, and that may mean quite a long period of confinement. Actually, once patients get to us – and I hope this is not taken wrongly – they are rather inclined to find that possibly they would rather be considered a criminal than a mental case. That has been my experience right through, but I realize that there has been abuse. I suppose there will be abuse of practically any provision. * * * [A]s a matter of fact, most of the patients, nearly all of the patients, we send back to court as competent to stand trial, wish to go back to court. It is very rarely that there is any opposition. * * * I think that this matter of mandatory commitment by reason of insanity is highly desirable. * * * But

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(Cont'd)

According to the 1962 Annual Report, Department of Health, Education and Welfare, of 782 District of Columbia prisoners in St. Elizabeths Hospital as of June 30, 1962, 87 were being held for examination; 248 as mentally incompetent; 296 as not guilty by reason of insanity; 90 under sentence, and 61 as sex psychopaths. Statistics published in the Washington, D.C. *Evening Star*, on March 12, 1961, p. B-4, indicate that while, in 1957, only 7 out of 473 criminal cases in the District of Columbia (1.5%) were disposed of by a finding of not guilty by reason of insanity, by February, 1961, the number had increased to more than 25%.

[2] Hearings on *A Bill to Amend the Act entitled "An Act to Establish a Code of Law for the District of Columbia," Approved March 3, 1901, and for Other Purposes*, Subcommittee on the Judiciary of the Committee on the District of Columbia, United States Senate, S. 2274, June 28, 1955, Vol. 1, pp. 53-55, 57.

> I think that the proviso, if it is known to the defendant, that if he is acquitted, if he is successful in his plea, that he was insane at the time of the act, it is going in itself to reduce substantially the number of false pleadings, if he knows that he will be confined for a wholly indefinite period in a mental hospital, and sometimes that might well turn out to be a good deal longer than the sort of sentence he would get if he were found not insane at the time of the act. * * * [T]he question was raised about jury trial in determining whether or not a person should be sent to the mental hospital as a matter of determining his competency. I am sure that the jury is quite unnecessary for that. * * * This is a preliminary proceeding. It does not go to the issue, of course, to the guilt or innocence of the defendant.[3]

Testifying in favor of the same bill before a House Subcommittee,[4] attorney George L. Hart, Jr. (now a U. S. District Judge), said:

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[3] Cf. *United States v. Pound*, D.C.D.C., Criminal No. 76,028, where the defendant was confined in St. Elizabeths Hospital from December 21, 1945, to May 7, 1958, as incompetent to stand trial after he had been accused of making treasonable broadcasts over Italian radio facilities, the content of which broadcasts was largely a vilification of the Jews designed, according to the indictment, "to create racial prejudice and distrust of the Government of the United States." Dr. Overholser was the St. Elizabeths Hospital superintendent from 1937 to 1962.

[4] Hearings on *A Bill to Amend the Act entitled "An Act to Establish a Code of Law for the District of Columbia," Approved March 3, 1901, and for Other Purposes*, Subcommittee on Crime Investigation, Committee on the District of Columbia, United States House of Representatives, H.R. 6585, June 8, 1955, Vol. 1, pp. 27-28.

> It is also true – and on this all psychiatrists agree – from the moment a person enters a mental hostal he is subject to treatment. You cannot enter a mental hospital and say, "A person is here merely for examination." The moment he walks into the walls of that institution he is subjected to treatment.

Hart recommendations included confinement in St. Elizabeths for observation for "a brief period" of up to six months; no jury trial; mandatory commitment of those found "not guilty" by reason of insanity, and the "mental disease or mental defect" test by which practically anyone the Government wants to imprison can be qualified as mentally ill.

II

The petitioner was ordered committed to St. Elizabeths Hospital although he had not raised an insanity defense and his wife had testified as to his sanity, and it is cruel and unusual punishment and a deprivation of civil rights where involuntary medical treatment is imposed on an individual over the opposition of the individual and/or his nearest of kin.

Although insanity has been a medical problem at least since Asclepiades of Bithynia (124 B.C.-50? B.C.), the profession of medicine has never discovered its cause. Cures have been attempted by whipping, douches, insulin-induced convulsions, surgery drugs and group therapy, but, while some cures have been effected, this seems to have been more by accident than design.[5] Thus, the

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[5] See Franz G. Alexander, M.D., and Sheldon T. Selesnick, M.D., *The History of Psychiatry* (New York: Harper & Row, 1966), pp. 279-296.

treatment of mental ailments is still a matter of trial and error, and the treatment afforded to inmates of public mental institutions is essentially experimentation.

The medical view of experimentation on involuntary subjects was explained by Karl Brandt, M.D., Reich Commissioner for Health and Education, major general in the Waffen-SS, and Hitler's escort physician, who was on trial before a United States Military Tribunal in 1947. Asked whether he regarded experimentation on human beings without their consent as criminal, Dr. Brandt said:

> It depends on what kind of experiments we are talking about. In my opinion the question of consent plays an important part in judging the experiments as a whole — an aggravating part if the experiments are considered criminal. * * * You can call it an experiment even when it is only a matter of testing some newly introduced drug. There is the conviction that it will be helpful, but the final knowledge is lacking. Even such a thing can be called an experiment. * * * In addition, the question of voluntary and involuntary experiments is of psychological significance in the case of a prisoner, as it may be with the insane. * * * There are three aggravating aspects with respect to the question of the criminal element in experiments: their involuntary character; the lack of necessity for them, and the danger involved.[6]

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[6] *United States v. Brandt*, United States Military Tribunals, Nuremberg, Official Record, Case No. 1, Tribunal 1, Volume 8a, pp. 2577-2578:

> Es kommt darauf an, um was fuer Experimente es sich dabei handelt. Die Frage der Zustimmung spielt meiner Meinung nach in der Gesamtbeurteilung der Experimente eine wesentliche Rolle, und zwar in der Beurteilung, wenn

(Cont'd)

At the completion of the trial the Military Tribunal promulgated ten rules to be observed in human experimentation,[7] the first of which stated:

> The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject

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(Cont'd)

man das Wort verbrecherisch dabei gebraucht, eine beschwerende. * * * Man kann schon von Experiment sprechen, wenn man ein neu eingefuehrtes Medikament anwendet. Man ist dabei der Ueberzeugung, das hilft, ohne dass man es im letzten genau weiss. Auch so etwas kann schon als Experiment bezeichnet werden; deswegen moechte ich einen Unterschied machen in dem Problem der Fragestellung, die man behandelt. Ausserdem kommt hinzu, dass die Frage Freiwilligkeit und Nichtfreiwilligkeit bezueglich eines Gefangenen schon psychologisch eine Rolle spielt, ebenso in Hinsicht auf Geisteskranke eine Bedeutung haben kann. Man wird daher sich klar sein muessen, wenn man eine solche Frage von vornherein mit verbrecherisch beantwortet, an was fuer einen Versuch es sich dabei handelt. Die erschwerenden Momente in Hinblick Verbrechen allgemein bei Versuchen sind in drei Punkten, naemlich der Nichtfreiwilligkeit, vor allem der Nichtnotwendigkeit eines Versuches und drittens in der Gefaehrlichkeit eines solchen.

[7] *United States v. Brandt*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. 2, p. 181, *et seq.*

> there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.[8]

That doctors practicing at St. Elizabeths Hospital have not always been meticulous in observing these principles is indicated by a passage from *Psychosurgery* by Drs. Walter Freeman and James C. Watts:[9]

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[8] Dr. Brandt's views differ somewhat from those of American doctors. In 1964 it was disclosed that over a ten-year period nearly 300 subjects had been injected with live cancer cells in experiments conducted by the Sloan-Kettering Institute for Cancer Research. Solomon Siegel, executive director of the Jewish Chronic Disease Hospital in Brooklyn, N. Y., where some of the experiments were conducted, said the patients did not know they were receiving injections of live cancer cells; they were told they were being injected with cells to test their resistance to cancer. Of the 22 Jewish Chronic Disease Hospital patients so injected, six died. Defending his failure to disclose the true nature of the experiments to the patients, Dr. Chester M. Southam, who directed the experiments for the Sloan-Kettering Institute, said: "It is not necessary to present [the subject] with what you feel are inconsequential data and [it is] unethical to ram down his throat information which is detrimental to his condition." (New York *Times*, January 21, 1964, p. 31; January 26, 1964, p. 70.) Although the petitioner does not intend to press the point, it is, nevertheless, a question as to whether the St. Elizabeths doctors, in administering a newly-introduced drug to the petitioner with 26 possible side-effects undisclosed to the petitioner without the petitioner's or his wife's consent and without the sanction of a court of proper jurisdiction, were guilty of criminal assault.

[9] Walter Freeman, M.D., and James C. Watts, M.D., *Psychosurgery, In the Treatment of Mental Disorders and Intractable Pain* (Springfield, Ill.: Charles C. Thomas, 1950), pp. 66-67.

Often patients with obsessive tension states seek prefrontal lobotomy in the belief that it is the only thing that can possibly relieve their suffering. Women with involutional depression feel hopeless about everything, including the possibility of benefit from operation, and require a great deal of persuasion to get them to enter the hospital. Negative suggestion is often helpful. We tell them about the benefits of the operation and assure them that they are not sick enough to need it. Many of our schizophreincs are confused and disorganized and do what they are requested without asking why. Some of the patients who are brought to us are unwilling to follow any suggestions and require a hypodermic of morphine or electfoshock to quiet them enough to get them to enter the hospital. * * * * [A] patient (Case 238) was brought to the George Washington Hospital in shackles by ambulance from the midwest, where he had been a difficult patient for eight years. He had a fiery red beard and red hair, and one leg amputated at the midthigh. He was cursing so loudly and waving his stump so violently that the special nurse who was waiting to go on duty refused to take the case and the superintendent of the hospital refused to admit the patient. We were unable to persuade them to change their minds, so the patient was transferred immediately to the psychopathic unit at the Gallinger Municipal Hospital and then to St. Elizabeths where we performed a lobotomy in May, 1944.

III

Although the petitioner is white, Anglo-Saxon, Protestant (WASP), the petitioner was subjected to treatment by Jewish physicians, and it is cruel and unusual

punishment and a deprivation of civil rights where a person is compelled to accept involuntary medical treatment from a physician of a race, religion and/or national origin disparate from that of the person being treated.

A cherished right of American citizenship is the right to select one's own physician. No professional relationship is more intimate than that between physician and patient, and the patient's confidence in the physician is an important element in the patient's restoration to health. In a Brookings Institute study[10] Herman M. Somers and Anne R. Somers said:

> The physician's relation to [death] – however helpless he in fact may be – has endowed him, in the eyes of centuries of patients, with an aura of mystery. To the extent that the physician identifies himself with this priestly role and takes on himself the burden associated therewith, or at least appears to do so through the gravity of his personal demeanor and behavior, his supra-scientific role continues to be respected and perpetuated, reinforcing in the eyes of individual patients and society at large his status as a dispenser of increasingly scientific medicine.

Because of the priestly role in which patients see their doctors, the right of a patient to select a doctor is even more vital than the right of selecting his friends. In 1961, Dr. Leonard W. Larson, president of the American Medical Association, told the Congressional Committee on Ways and Means:[11]

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[10] Herman M. Somers and Anne R. Somers, *Doctors, Patients and Health Insurance* (Washington, D. C., The Brookings Institute, 1961), p. 460.

[11] Hearings on *Health Services for the Aged Under the Social Security Insurance System,* Committee on Ways and Means, United States House of Representatives, first session on H.R. 4222, August 2, 1961, Vol. 3, p. 1346.

> It is the patient, and his ability to choose freely, that exact the utmost from the doctor-patient relationship. The physician who does not possess the confidence of his patient is handicapped in his effort to cope with disease. But so long as the patient is free to seek professional treatment without restraint, he can quickly find the physician in which he does have confidence. Given that confidence, a doctor's skill can sometimes surmount shortcomings in the facilities and resources available to him. * * * It is axiomatic that first-rate medical care must be appropriate to the needs of the patient – medically, socially, economically and psychologically.[12]

It can be stated as a general rule that a French patient will have more confidence in a French physician than in a German physician; a Hindu patient in a Hindu physician than in a Catholic physician, and a Negro patient in a Negro physician than in a Caucasian (honky) physician. This is no irrational prejudice, for it can be presumed that the French physician has greater empathy with the French patient's emotional responses than the German physician; the Hindu with the Hindu and the Negro with the Negro.

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[12] Cf. Thomas S. Szasz, M.D., *Psychiatric Justice* (New York: The Macmillan Company, 1965), p. 36. In respect to the practice of allowing the prosecution (or the court) to raise the question of the defendant's competence to stand trial, Dr. Szasz said:

> [T]he defendant is not a "patient", the prosecutor and his psychiatrists are not his "doctors". The relationship between the defendant and the state (and its representatives) is antagonistic, not cooperative. The attempt to make it appear cooperative – such as forcing the defendant to submit to psychiatric examination by agents of the state – is simply a strategic maneuver by the government to render its opponents impotent. It is a symptom of despotism – of the worst kind.

During his detention at St. Elizabeths Hospital the petitioner received involuntary medical treatment almost exclusively from a Jewish doctor.[13] While the petitioner is primarily of Anglo-Saxon stock, born in America of American-born parents, and by religion an Episcopalian, the physician who treated the petitioner at St. Elizabeths is racially and culturally Jewish, born and largely educated in Germany.

Contrary to those who seek an amalgamation of race and religion, the petitioner suggests that racial and religious prejudice is socially desirable and necessary to the evolutionary process; that racial and religious conflicts crystallize the cultural values of the protagonists, and that persecution strengthens rather than weakens those who are persecuted. Necessary, however, as this prejudice may be to the evolutionary process, it is not conducive to the restoration of health, and, in fact, where there

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[13] The petitioner was arrested following a futile gesture to avenge his wife whose daughter had been appropriated by another woman. In a Christian culture nothing is more sacred than motherhood (as witness the Marianists), a concept which, having no counterpart in Judaism or Jewish tradition, is presumably incomprehensible to Jewish judges and psychiatrists. Jewish leaders (Moshe Sharett, Louis D. Brandeis *et al.*) appear to agree that "Jewishness" (*Yiddeshkeit*) is definable; it consists of any one or a combination of several factors not shared by gentiles: *e. g.* adherence to Judaism, advocacy of Zionism, observance of Jewish dietary laws, racial identification with Yemenites and Kurds. "The highest point of a people's development," said Hegel, "is the rational consciousness of its life and conditions, the scientific understanding of its laws, its system of justice, its morality." Jewish writers have noted that the search for national, religious and racial consciousness tends to make the Jew a foreigner in any land in which he lives; he is less anxious to absorb (and be absorbed by) the culture of his adopted land than to impose his culture on others. Often the result is to obstruct the development of the people among whom he lives and to obfuscate the understanding of the people's own laws, system of justice and morality.

is antipathy between the physician and patient, it may have the opposite effect. Thus, where, as in the case of the petitioner, a gentile prisoner is compelled by a Jewish judge and a Jewish prosecutor to accept involuntary medical treatment from Jewish physicians; where involuntary medical treatment is imposed on the prisoner accused of but not shown to have committed a crime, and where involuntary medical treatment is imposed on the prisoner by the Government over his own and his wife's opposition because a medical expert employed by the Government considers him incompetent to stand trial, the prisoner is patently being subjected to cruel and unusual punishment and deprived of his civil rights.

The petitioner submits that every American citizen, Jew or gentile, white or black, sane or insane, accuser or accused, is guaranteed the privileges and immunities of the Constitution, and the petitioner further submits that discrimination against a member of one race by members of another race is unconstitutional, un-American, and contrary to law.

Respectfully submitted,

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